No. 83-1482
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

In the Matter of the Application of

CHARLES A. WEIL,

Petitioner,

-vs.-

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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QUESTION PRESENTED

Where petitioner has failed to raise a facially valid question regarding the constitutionality of the New York City Administrative Code provision in issue, and where a hearing on the merits may exonerate petitioner, did the New York Court of Appeals properly affirm the decision of the New York Supreme Court dismissing the state court petition seeking to prohibit the respondents from conducting the hearing?

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STATEMENT OF FACTS

On or about June 6, 1982, petitioner received a Notice of Violation for "horn honking" in a non-emergency situation, in contravention of the New York City Administrative Code Section 1403.3-4.03(1). Petitioner was seated in his car on East 59th Street in Manhattan at about 5 p.m. and, he claimed, attempted to alert a police officer to the existence of a traffic jam. By letter dated June 8,

1982, petitioner requested that the Environmental Control Board provide him with a bill of particulars and supporting affidavit, pursuant to the New York Criminal Procedure Law.

Thereafter, petitioner received a notice of hearing on the citation for September 20, 1982. By letter dated June 24, 1982, petitioner again requested that the Environmental Control Board supply him with a bill of particulars and supporting affidavit and stated that if his request were not complied with, he would move for dismissal on that basis and on the grounds that the regulation was unconstitutionally vague, indefinite, unreasonable, and in violation of the first and sixth amendments of the United States Constitution. The requests were not met, since the proceeding was not criminal in nature. Petitioner thereafter maintained that the proceeding was civil in nature and requested discovery pursuant to "CPLR Article 30/31"; no discovery was provided.

By letter dated August 4, 1982, addressed to respondent Ilmyn Streud, the Administrative Law

Judge assigned to the case, petitioner, inter alia, reiterated that a bill of particulars and supporting affidavit were material and necessary for due process. Petitioner maintained in that letter as well as in another of August 17, 1982, that the proceeding was criminal in nature.

Petitioner commenced the instant proceeding on or about August 30, 1982, by order to show cause. He sought to prohibit the Environmental Control Board from proceeding with the hearing since he claimed the regulation pursuant to which he had received the notice of violation (NYC Administrative code 1403.3-4.05) was unconstitutionally vague, indefinite, and unreasonable and denied petitioner his right to communicate the existence of a violation of law ("a serious breakdown of traffic control") to a police officer.

By letter dated September 22, 1982, addressed to Steven Alexander, the assistant corporation counsel handling the case, petitioner amended his petition to add paragraph 11, in which he stated that

he did not challenge the right of the Environmental Control Board to hold a hearing on the evidence but rather challenged inter alia, the right of the Board to legislate "vaguely" and "unconstitutionally"; pass on the rule's construction and constitutionality; find the facts and the law; and hear any appeal of the matter, since such a system denied the essentials of due process and separation of powers.

Respondents thereafter (on or about October, 1982) cross-moved for dismissal of the petition for failure to state a cause of action. In the affirmation in support of the cross-motion, counsel stated that prohibition is appropriate only where a clear legal right has been asserted and where it is clear that there is a threat that the court or administrative body is about to act without jurisdiction over the subject matter or will exceed its powers; and even in such circumstances, prohibition may not lie where the alleged defects could be otherwise corrected. Moreover, petitioner's complaint regarding discovery was not properly cognizable in the context of prohibition. Respondents further contended that

the constitutional issue could not properly be raised at this time since no factual determination had been made and that after such determination petitioner might be exonerated, thus mooting the issue. Respondents noted too that the alleged vagueness of the regulation in question did not raise a substantial constituitonal claim since the issue is whether petitioner had used the horn "as a sound signal of imminent danger".

Petitioner submitted a reply affidavit, dated October 8, 1982, in which he maintained, inter alia, that the proceeding was brought "principally because of the constitutional aspect of the matter"; that petitioner did not necessarily seek a writ of prohibition; that there was no material question of fact but rather a question of the constitutionality of the regulation.

ORDER OF THE NEW YORK SUPREME COURT, SPECIAL TERM

By order dated December 17, 1982, the New York Supreme Court, Special Term, denied petitioner's motion in all respects. The court held that:

> Petitioner is attempting to restrain an officer from acting in a judicial or quasi-judicial capacity. This extraordinary remedy is used only when there is a clear legal right; and only when that body or officer acts or threatens to act in a manner beyond his jurisdiction.
>
> Here the Board has the legal authority to hold a hearing and render a determination on the alleged violation. Petitioner's claim that the hearing should not be held because he was denied discovery is without merit at this time. The hearing could possibly exonerate him, and render all other issues raised as moot.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

By order dated June 30, 1983, the New York Supreme Court, Appellate Division, First Department, unanimously affirmed the order of

Special Term.

ORDERS OF THE NEW YORK COURT OF APPEALS

In its order dated November 3, 1983, the New York Court of Appeals dismissed petitioner's appeal on the ground that "no substantial constitutional question is directly involved." In its order of December 20, 1983, the Court denied petitioner's motion to vacate the order of dismissal.

RELEVANT STATUTE

§1403.3-4.05 ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

> §1403.3-4.05 Sound signal devices. No person shall operate or use or cause to be operated or used any sound signal device so as to create an unnecessary noise, except that:
>
> (1) No person shall operate or use of cause to be operated or used any claxon installed on a motor vehicle, except as a sound signal of imminent danger provided that such operation or use shall be considered in any proceeding before the board pursuant to any applicable section of article VIII of this code except section 8.25 prima facie evidence of a violation of this subsection and that a notice of violation shall in every instance

issue against a person operating, using or causing to be operated or used a claxon installed on a motor vehicle.

ARGUMENT

THE PETITION WAS PROPERLY DISMISSED, SINCE PETITIONER HAS PRESENTED NO FACIALLY VALID CHALLENGE TO THE CONSTITUTIONALITY OF THE NEW YORK CITY ADMINISTRATIVE CODE PROVISION IN ISSUE AND, IN ANY EVENT, A HEARING ON THE MERITS MAY EXONERATE PETITIONER AND THUS RENDER THE CONSTITUTIONAL ISSUE MOOT.

The gravamen of petitioner's opposition to the Environmental Control Board hearing on the citation is a challenge to the general scheme of administrative law, that is, that an administrative body may find facts and impose sanctions for violations of rules enacted to protect the public welfare. Certainly it cannot seriously be maintained that the Environmental Control Board is without jurisdiction to review allegations of infractions of the regulations designed to curtail unnecessary noise in New York City. Even if it were the case, as

petitioner believes it is, that the alleged violation was issued for a trivial noise or traffic infraction, that fact does not vitiate the legitimacy of the regulation or the administrative scheme for enforcing it. Moreover, under Ex parte Young, 208 U.S. 123 (1908), and Younger v. Harris, 401 U.S. 37 (1971), the federal court will intervene in state court prosecutions only in extraordinary circumstances. It is submitted that, as will be discussed below, those circumstances do not obtain in the instant case. For similar reasons, the State courts properly declined to enjoin the proceedings. No valid reason exists to enjoin the administrative agency from conducting a hearing on the merits of this violation and to render a decision.

Petitioner contends that the regulation is unconstitutional because of its vagueness and overbreadth and because it infringes upon his right to free speech under the first amendment. He contends that the regulation in question is vague and overbroad essentially for two reasons: first, because it prohibits the use of sound devices except for

situations of imminent danger and that the meaning of imminent danger is unconstitutionally vague and indefinite (Pet. Br. at 11-18); second, because specific decibel levels are not set forth so as to establish a standard of acceptable noise (Pet. Br. at 18-23). He also contends that the regulation impermissibly infringes on his right to communicate (Pet Br. at 23-26).

It is submitted that the activity in issue, "horn-honking", is not speech. Considerations of the protections of the First Amendment therefore do not apply. What is involved is simply a valid exercise of the police power of the municipality in regulation of non-communicative conduct. "Horn-honking" is not communicative; even if it is being used to alert, it is merely noise, subject to valid regulation in the public interest.

Assuming arguendo the use of car horns to be generally protected by the First Amendment as a mode of communication, it is submitted that the City may nonetheless regulate the use of such devices. The ordinance in question does not attempt

to regulate the content of such "expression". All use of car horns is prohibited (except, of course, for emergencies) regardless of the purpose or purported meaning intended by the user. The ordinance does not discriminate among various possible messages which one may seek to communicate through use of a car horn. The ordinance is therefore content-neutral and the standard for such regulations is that they must be reasonable as to the time, place, and manner of the restrictions in the furtherance of significant governmental interests. Overly loud sound amplifiers, for example, may be required to be turned down. See Grayned v. City of Rockford, 408 U.S. 104, 115-116 (1971). "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 p.m. disturbs neighborhood tranquility." Consolidated Edison Company v. Public Service Commission, 447 US 530, 536 (1980). In the instant case, the "content" of

petitioner's communication was not infringed. The statute in issue seeks merely to regulate the "time, place, and manner" of the noise in furtherance of the legitimate governmental concern of reducing unnecessary noise in a noisy city. Nor does the ordinance unduly restrict the channels of communications with policemen. A citizen has more than adequate means of communication with patrolmen, aside from the use of a car horn. The ordinance really does not more than restrict the use of a piece of safety equipment (required to be on a motor vehicle by government regulation) to the use for which the horn is intended and designed - to warn of imminent danger. The use of car horns in situations not involving imminent danger undercuts the usefulness of such horns as a method of communicating the existence of an actual emergency condition, and the government has a compelling interest in seeing that this does not occur.

It is submitted that a hearing is provided for the express purpose of determining the facts and

circumstances, to ascertain the noise was unnecessary or whether there was an imminent danger.

It is precisely because the exigencies of various situations will differ that no more specific standard is - or should be - enunciated. Certainly, the language of the statute is not so vague that a reasonable person cannot grasp its impact. Cf. People v. Stefanik, 163 Misc. 2d 529 (Sup. Ct. App. Term, 1st Dept., 1980); People v. Cruz, 48 NY 2d 419, 424 (1979). Petitioner is in a position to describe the situation in issue and present his justification for the use of his car horn and there is no basis to assume that he would be given anything but a fair hearing. Indeed, it is in the context of the hearing itself that petitioner may properly raise any procedural objections he may have (e.g., his objections to lack of pre-hearing discovery; see Pet. Br. at 29).

An exceedingly strong presumption of constitutionality applies to the ordinances of a municipality enacted in the exercise of its police

power. See Lighthouse Shores v. Town of Islip, 41 NY 2d 7, 11 (1976); People v. Judiz, 38 NY 2d 529, 531 (1976). A statute will be upheld as valid if it has a rational basis (Grossman v. Baumgartner, 17 NY 2d 345, 349 [1966]); if any state of facts justifies the law, the court's power of inquiry ends. Lighthouse Shores v. Town of Islip, supra, 41 NY 2d at 11, 12; Defiance Milk Products v. DuMond, 309 NY 537, 541 (1956); DeSena v. Guide, 24 AD 2d 165, 169 (2nd Dept., 1965). It is submitted that the challenged provision of the Administrative Code is rationally based in fact and is a proper exercise of the City's power to protect and preserve the health and welfare of its inhabitants. The provision is based on the need to reduce the high level of noise in the City. There is nothing unreasonable or arbitrary in placing a duty upon a motorist to avoid making unnecessary noise. A hearing before the ECB will determine whether petitioner should be found in violation of the statute. The agency's application of the statute to petitioner's case would then be subject to judicial review by way of a special

proceeding pursuant to state law brought to review the determination. See Younger v. Harris, 401 U.S. 37, 49 (1971).

In view of the above, it is submitted that Section 1403.3-4.05(1) of the Administrative Code is neither unconstitutional on its face nor is it unreasonable, arbitrary or capricious.

For similar reasons petitioner's contention that the regulation violates his First Amendment right to free speech is without merit. The regulation is designed to curtail unnecessary noise; it is not intended to - nor does it - infringe upon any individual's right to "communicate." As noted supra, the regulation itself provides for defense that the noise was necessary. Petitioner has in fact presented such a defense, in his papers in the state courts in the instant proceeding. It is submitted that the proper forum for such defense is the ECB hearing itself. See Younger v. Harris, 401 U.S. 37, 51 (1971).

Indeed, the various objections raised by petitioner are either cognizable in the context of

the hearing or would be rendered moot by a favorable adjudication. The instant appeal does not fall within the exception to the mootness doctrine whereby a court may entertain an appeal where there exists an issue of general importance which is likely to recur and to evade review by the court. As established supra, it is plain that the City of New York has the power to adopt the challenged statute and that it is a reasonable exercise of its police power. This case thus presents no questions "the fundmamental underlying principles of which have not already been declared" and is not "of the class that should be preserved as an exception to the mootness doctrine." Matter of Hearst Corp. v. Clyne, supra, 50 NY 2d 707, 715 (1980).

Furthermore, even assuming that the questions raised in this case may recur, in that plaintiff or others may receive subsequent summonses for making unnecessary noise, there is no danger that such future action will evade judicial review. Should an administrative proceeding terminate in a decision adverse to a party, that party will have full recourse

to the courts to challenge the adverse determination as well as the statute under which it has been penalized. Hence, there is no reason to decide the constitutional issues petitioner attempts to raise herein instant case, which may well become moot as to the parties, even though similar cases may arise in the future. See, DeFunis v. Odegaard, 416 U.S. 312, 329 (1974). There is consequently no need for this court to pass upon the constitutional claims raised at this time.

It follows, therefore, that the court below did not err in refusing to convert the petition to one for declaratory judgment on the constitutional issue. Plainly, the fact that such conversion is permissible does not per se imply that it must be granted. The granting of a declaratory judgment rests in the sound discretion of the court. Snap 'N' Pops v. Dillon, 66 AD 2d 219, 220 (2nd Dept., 1979). A declaratory judgment action may be appropriate where the validity of a statute involving criminal sanctions is in question. See French v. Devine, 547 F. Supp. 443 (D.C. D.C. 1982). Where questions of

fact exist, however, the court, in its discretion, may decline to render a declaratory judgment. French v. Devine, supra.

In the instant case, the petition raises a factual issue as to whether petitioner in fact violated the administrative code. There is a factual issue as to whether petitioner was justified, within the meaning of the Administrative Code, in using his car horn. Indeed, petitioner's appearance before the ECB and request for discovery on the charges set forth in the summons indicate an intention to contest his liability. Under such circumstances, the court, we submit, did not abuse its discretion in determining that the factual issues precluded the granting of a declaratory judgment. The petition was dismissed not because it was not presented in the proper form (that is, that petitioner brought a proceeding for review pursuant to CPLR Article 78, rather than instituting an action for declaratory judgment), but instead because there was no need for the court to address the constitutional issues at that time; factual questions remained - and still

remain - outstanding. It is after a hearing that, assuming petitioner is adjudicated to have violated the regulation, constitutional issues may properly be raised.

As noted above, a hearing at which the facts are adduced might result in an interpretation of the statute favorable to petitioner, thereby obviating the necessity for a determination of the "constitutional" issues. The administrative agency should be given the opportunity to "develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and ... to prepare a record reflective of its expertise and judgment." Watergate II Apartments v. Buffalo Sewer Authority, 46 NY 2d 52, 57 (1978). Cf. French v. Devine, 547 F. Supp. 443, 447 (D.C. D.C. 1982), where the court refused to issue a declaratory judgment as to whether certain proposed activity would subject the plaintiff to prosecution under the Hatch Act before he had obtained administrative rulings on the legitimacy of his proposed activity.

In view of the above, the court properly determined, in the exercise of its discretion, that factual questions existed which should have been resolved, in the first instance, at the administrative level. At this stage of the proceeding, it cannot be said that the court, in dismissing the petition, improperly "evaded" the constitutional issues. See Demarest v. City Bank Co., 321 US 36, 42 (1944).

Since the constitutional issues need not have been addressed, it was not error for the court to refuse to deem the petition as seeking declaratory judgment and to dismiss the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 29, 1984

Respectfully submitted,

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